SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 775

WILMINGTON TRUST COMPANY, EXECUTOR OF ALICE DUPONT ORTIZ, DECEASED,
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

REPLY MEMORANDUM OF PETITIONER

WM. S. POTTER,
Counsel for Petitioner.

WILLIAM L. HENNESEY,
DANIEL F. WOLCOTT,
SUTHERLAND, BERL, POTTER & LEAHY,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

No. 775, October Term, 1941

WILMINGTON TRUST COMPANY, EXECUTOR OF ALICE DUPONT ORTIZ, DECEASED,
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

REPLY MEMORANDUM OF PETITIONER

The petitioner desires to point out certain erroneous statements in the brief submitted by the government.

A.

On page 7, first paragraph of the brief it is stated that the Circuit Court re-examined the legal effect of the taxpayer's transactions, as under the decisions of this court it had the right to do. As pointed out in petitioner's main brief at pages 11 to 15, what in fact the Circuit Court did was not re-examine the legal effect of the taxpayer's transactions, but to re-examine and determine for itself the facts.

The government's brief asserts that the instant case is controlled by the two cases of *Henry B. duPont* v. *Commissioner*, 98 Fed. (2d) 459, certiorari denied 305 U. S. 631; *Henry F. duPont* v. *Commissioner*, 110 F. (2d) 641, certiorari denied, 311 U. S. 657. These two cases are not applicable to the instant case for the reason that in both of those cases the taxpayers stipulated that they were to be bound by the form into which they had cast the particular sales.

The subsequent argument in the government's brief under this point clearly indicates that the position taken by the government is that the books and records kept by the brokers and by the taxpayer are determinative of this question. That is to say, that despite what actually took place, the particular sales in controversy must be treated as "short" sales because they had been made through a broker's account labeled "short." The argument therefore disregards the decisions of this court pointed out in the petitioner's brief commencing on page 17 wherein it is stated that tax liability is to be determined by what actually happened and not the form in which a transaction is cast.

On page 10 of the government's brief it is stated that the broker was authorized to treat all the taxpayer's accounts as one for margin purposes. This statement is not accurate. The authority given to the broker was to treat all the accounts of the taxpayer as one for all purposes, not merely for margin purposes, (R. 3) and the evidence shows as the Board found that the broker treated the accounts as one for all purposes. The effect of the Circuit Court's opinion and the argument advanced by the government is that the broker and the taxpayer violated the rules of the New York Stock Exchange and Regulation T. of the Securities Exchange Act of 1934 by effecting short sales of listed securities and the extension and maintenance of credit thereon. Such a holding will not be made unless there is clear evidence to support it.

B.

In the second point of the government's brief it is urged that the instant case is controlled by *City Bank Co.* v. *Helvering*, 313 U. S. 121; *United States* v.

Pyne, 313 U. S. 127; and *Higgins* v. *Commissioner*, 312 U. S. 212. The cited cases are not applicable for the reason that all of them deal with transactions involved in the management and conservation of an estate, and the court did not have before it a situation as it does in the instant case where the taxpayer is engaged in the buying and selling of securities and commodities on margin for profit and not merely to conserve her estate. Absent also from the three cited cases is the fact of the large volume of transactions conducted by the taxpayer in the course of a year.

C.

On page 14 of its brief the government urges that the petitioner's argument that only the net number of shares was turned over to Laird & Company by Laird, Bissell, & Meeds is not an accurate statement. This is so, the government asserts, because it is stipulated that Laird & Company set up on its books the same designated accounts in the same amounts as had been carried by Laird, Bissell, & Meeds. This statement by the government ignores the fact that it was expressly stipulated that only the net number of shares of stock were transferred to Laird & Company. (R. 30)

The argument of the government commencing with the last paragraph of page 14 of its brief is at the best speculative and is not at all an answer to the actual facts with respect to McKeesport Tin Plate stock set forth in the petitioner's brief, pages 18 to 20. If the argument of the government and the opinion of the Circuit Court are correct, the absurd result is reached that the taxpayer would have been forced to borrow

her own stock from her agent to cover the supposed short sales.

Conclusion

It is respectfully submitted, therefore, that the petition for certiorari should be granted.

WM. S. POTTER
Attorney for Petitioner
948 Delaware Trust Building
Wilmington, Delaware

January, 1942

WILLIAM L. HENNESEY
DANIEL F. WOLCOTT
SOUTHERLAND, BERL, POTTER & LEAHY
Of Counsel
Wilmington, Delaware